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No. 95-358

In the Supreme Court of the United States

OCTOBER TERM, 1995

GENE E. RICE, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court exceeded its jurisdiction, in the context of approving a global settlement of ten consolidated actions, when it issued an order barring the nonsettling parties from asserting contribution and noncontractual indemnity claims against Pinnacle West Capital Corporation.

2. Whether the settlement imposed a penalty against the nonsettling parties without due process of law and in violation of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.

3. Whether, in determining the permissibility of the district court's order barring the nonsettling parties' noncontractual indemnity claims, the court of appeals appropriately considered applicable provisions of Arizona law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B19) is reported at 51 F.3d 194. The opinion of the district court (Pet. App. A1-A47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1995. A petition for rehearing was denied on June 5, 1995. Pet. App. C1-C2. The petition for a writ of certiorari was filed on August 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Gene E. Rice and Ernest F. Modzelewski are former officers and directors of MeraBank, a Federal Savings Bank (MeraBank), which failed in February, 1990. Pet. 5. Rice had been MeraBank's chairman and chief executive officer and a director of its parent company, Pinnacle West Capital Corporation (Pinnacle West); Modzelewski was MeraBank's president. *Ibid.* Along with their co-petitioner spouses, Rice and Modzelewski seek review of the court of appeals' decision affirming the district court's approval of a partial settlement of a suit brought by the Resolution Trust Corporation (RTC) against several former MeraBank officers and directors, including Rice and Modzelewski.

The partial settlement of the RTC suit was part of a larger, global settlement—achieved after almost two years of vigorous, judicially supervised negotiations—of ten consolidated lawsuits pending in the United States District Court for the District of Arizona. Those suits, which arose out of the failure of MeraBank, included two shareholder class actions (Class Actions), a shareholders' derivative action (Derivative Action), and six actions brought against the RTC by former MeraBank officers and directors who sought compensation allegedly owed them for their service at Merabank (Compensation Claims). Pet. App. B9-B10. More than forty persons joined the global settlement, including both of the relevant directors' and officers' liability insurers (D & O Insurers) and Pinnacle West, which was a named defendant in the Class Actions and a nominal defendant in the Derivative Action, and which would have been a

defendant in the RTC suit but for its execution of a tolling agreement with the RTC. *Id.* at B10, A18-A19.

Under the Stipulation of Settlement, executed on November 24, 1993, Pet. App. B10 n.2, Pinnacle West contributed $5.75 million to the settlement fund,[1] and the D & O Insurers (whose premiums were paid by Pinnacle West) contributed an additional $55.875 million, *id.* at A17-A18. Of the total, $34 million has been allocated to the settlement of the Class Actions, and the balance of $27.625 million has been deposited in a separate account to be applied toward the partial settlement of the RTC Action ($25 million) and the complete settlement of the Derivative Action ($2.625 million). *Id.* at B10 n.2.

The individual defendants made no out-of-pocket contributions to the settlement fund, but were required to give up their contested compensation claims against the RTC in exchange for full releases from personal liability. Pet. App. B11-B12. Although petitioners Rice and Modzelewski participated fully in the settlement discussions, and were offered the same terms as the other former officers and directors, they declined to join the settlement, preferring to pursue their individual compensation claims and to forego settlement on any basis that would require them to compromise those claims. *Id.* at A20.[2]

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[1] Pinnacle West had earlier paid $465,500,000 to the RTC (as receiver for Merabank) pursuant to a settlement with the Office of Thrift Supervision of claims made against Pinnacle West under a capital maintenance agreement. Pet. App. A17; Pet. 5-6.

[2] When Rice appeared to be the sole holdout, the RTC made a number of proposals to settle with him on terms more favorable than those offered to the other former officers and directors, including proposals under which Rice would have

Consummation of the settlement was made contingent on receipt of judicial approval and issuance of an order barring petitioners from pursuing against the settlors claims for contribution and/or noncontractual indemnity relating to the RTC suit. Pet. App. A2-A3.

2. On December 29, 1993, after a final settlement hearing, the district court rejected petitioners' arguments in opposition to the settlement and entered orders (i) approving the Stipulation of Settlement; (ii) dismissing the settling defendants' Compensation Claims, the Class Actions, the Derivative Action, and all of the claims asserted by the RTC (except as to petitioners); (iii) barring petitioners from asserting contribution or noncontractual indemnity claims relating to the RTC suit against the settling defendants and Pinnacle West (the bar order); and (iv) adopting the proportionate share offset rule with respect to the RTC's claims against petitioners, so as to limit petitioners' potential liability to their proportionate share of fault for the RTC's losses. Pet. App. A4-A5.

In its findings of fact and conclusions of law, the district court found that the settlement had been arrived at in good faith, and that it represented a fair and reasonable resolution of the RTC suit and the other consolidated actions. Pet. App. A28, B11. The court rejected petitioners' contentions that the settlement reflected a collusive attempt to injure

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received compensation in the form of receivership certificates. Pet. App. A20. Rice rejected those proposals, however (*ibid.*), and after Modzelewski joined Rice in his refusal to settle, the RTC discontinued its attempts to pursue an individually tailored solution, *id.* at A13, A20.

them, *id.* at A10-A11, A21-A24, observing that petitioners "were offered an opportunity to participate in the settlement on the same terms as offered to, and accepted by, co-defendant Settling Parties who are essentially similarly situated," *id.* at A19.[3]

The court also rejected petitioners' challenge to the bar order, concluding that "each of the settling RTC Defendants [wa]s entitled to protection against the expense and burden of further claims and litigation relating to the RTC Action," Pet. App. A29, and that extension of the settlement bar to Pinnacle West was appropriate "in the circumstances of this case," *id.* at A31. The court noted that, although Pinnacle West was not presently a named defendant in the RTC suit, "the RTC ha[d] indicated that [in the absence of a settlement] it would pursue claims against Pinnacle West." In addition, the court explained that the settlement of the various cases was "inextricably interrelated," *id.* at A17, and that Pinnacle West's direct contribution of $5.75 million and its authorization of the D & O Insurers' payments made Pinnacle West "a critical party to the overall settlement of the consolidated actions," without whose participation "the partial settlement in the RTC Action could not have occurred," *id.* at A34.

The court of appeals affirmed. Pet. App. B1-B19. It found nothing in the record "indicat[ing that] the

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[3] The court noted, in addition, that because it had adopted a proportionate share offset rule, petitioners were "left in the same position they would have been in if the other parties had not settled," Pet. App. A43, and that petitioner Rice would affirmatively benefit from the settlement, since, at no personal expense, he was being dismissed from the Class and Derivative Actions, in which he had substantial personal exposure, *id.* at A45.

district court abused its discretion in finding the settling parties reached their agreement in good faith," and "no evidence that the settling parties singled out the Nonsettlors for disparate treatment." *Id.* at B13. The court commented that, while the compensation claims asserted by petitioners were potentially more valuable than those of the individuals who settled (because petitioners had been more highly compensated officers), the worth of their claims was speculative.[4] In addition, the court reasoned that, since petitioners Rice and Modzelewski "were among the highest ranking officers at MeraBank, and therefore potentially subject to the greatest liability, they may have benefited more from the settlement than their settling counterparts, had they chosen to participate." *Id.* at B13-B14.

The court of appeals rejected petitioners' argument that the settlement violated their procedural rights under the Fifth Amendment and under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. The court observed that, because of the district court's use of the proportionate share offset rule, petitioners were "left in the same position they would have been in if the other parties had not settled." Pet. App. B15. They "were not prejudiced by the settlement, and therefore the RTC did not unfairly penalize

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[4] The speculative nature of petitioners' claims was demonstrated soon thereafter in *Modzelewski* v. *RTC*, 14 F.3d 1374 (1994), when the Ninth Circuit affirmed the dismissal of petitioner Modzelewski's suit against the RTC on the ground that his deferred compensation rights had not vested at the time the RTC took over MeraBank. *Id.* at 1378. The court concluded that Rice's compensation rights had vested, and remanded his claim for further adjudication. *Ibid.*

them or deprive them of a property or liberty interest." *Id.* at B17.

Further, the court concluded that the district court did not abuse its discretion by barring petitioners' contribution and noncontractual indemnity claims against the settling parties. Pet. App. B17-B19. The court found no support for petitioners' categorical assertion that a settlement bar can never apply to preclude claims against nonparties, and it affirmed the application of the bar in this case to claims against Pinnacle West, since Pinnacle West was a critical participant in, and contributor to, the overall settlement, and in light of the district court's application of the proportionate share offset rule. *Id.* at B17-B18. The court also rejected petitioners' contention that a settlement bar cannot be applied to preclude claims for noncontractual indemnity, "finding 'not a shred of logic upon which [to] base a principled distinction between bar orders against contribution, on the one hand, and orders against indemnity . . . on the other.'" *Id.* at B18-B19 (quoting *In re U.S. Oil & Gas. Litig.*, 967 F.2d 489, 495 (11th Cir. 1992)).

ARGUMENT

1. Petitioners argue (Pet. 13-19) that the district court exceeded its authority in barring the nonsettling defendants' potential contribution and noncontractual indemnity claims against Pinnacle West, because Pinnacle West was not a party in the RTC suit. That argument is without merit. There is no jurisdictional impediment to the entry of an order barring claims for contribution or indemnity against a nonparty that has fully participated in the settlement. The district court properly exercised its discretion to apply such a bar under the circumstances

of this case. The court of appeals' decision affirming the district court does not conflict with any decision of this Court or of any other court of appeals.

"There is little disagreement that contribution bars may be implemented; without them, settlement would be unlikely." *In re NBW Commercial Paper Litig.*, 807 F. Supp. 801, 810 (D.D.C. 1992); see also *In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987) ("Anyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented."). Although, like other aspects of a settlement agreement that affect the rights of third persons, application of a settlement bar is subject to scrutiny for its fairness to nonsettlors, see, *e.g.*, *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020 (2d Cir. 1992), we know of no case holding that a court is jurisdictionally incapable of precluding contribution or noncontractual indemnity claims against a settling party that was not a defendant in the underlying litigation. Petitioners provide no citation that supports that alleged jurisdictional limitation.

Nor do petitioners offer any substantive reason why a settlement bar should not apply to nonparties who have participated fully in the settlement. The settlement bar complements, and provides the justification for, the proportionate share offset rule, which limits the nonsettlors' liability in the principal suit to their share of fault in recognition of the nonsettlors' inability to recover from the settling parties in a later suit for contribution. Correspondingly, there is no unfairness in precluding the nonsettlors' rights to seek contribution when they will not be held liable in

the principal suit for more than their proportionate share of fault.[5] Having been accorded the benefits of the proportionate share offset rule (including protection against liability for damages caused by the acts or omissions of Pinnacle West), petitioners should not be permitted to disengage those benefits from the settlement bar, with which the offset rule was inextricably tied.

While repeatedly noting that Pinnacle West was not a party in the RTC suit, petitioners advance no reason why the settlement bar should not extend to Pinnacle West, which was a named defendant in the Class Actions, a nominal defendant in the Derivative Action, and would have been named as a defendant in the RTC suit "but for the tolling agreement's suspending the statute of limitations." Pet. App. A18-

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[5] In contrast, equitable indemnity provides a basis to shift the entire liability for the underlying judgment to a person with greater fault. A bar on equitable indemnity may therefore leave a nonsettling party in a worse position than it would have been in absent the settlement, even taking into account the effect of the proportionate share rule. See *NBW*, 807 F. Supp. at 810-811. That concern is not present in this case, because under Arizona law (which petitioners claim is applicable (Pet. 25-27)) "the party seeking indemnity must be free from any negligence (regardless of the nature of that negligence) contributing to the liability creating event." *Mountain States Tel. & Tel. Co.* v. *Corbin-Dykes Electric Co.*, 559 P.2d 1067, 1069 (Ariz. Ct. App. 1976). See also *Cella Barr Assocs., Inc.* v. *Cohen*, 868 P.2d 1063, 1068 (Ariz. Ct. App. 1994) ("Generally, there is no indemnity among joint tortfeasors."). Since the RTC's claims against petitioners are based upon allegations of tortious conduct, Pet. 6-7; Pet. App. A42-A43, if petitioners are found liable, they would not have any right to seek equitable indemnity from Pinnacle West even in the absence of a settlement bar.

A19. The district court had strong reasons for including Pinnacle West within the scope of the settlement bar. As the court recognized (*id.* at A17-A18), since Pinnacle West and its D & O Insurers contributed 100% of the funds for the settlement, Pinnacle West was a "critical party to the overall settlement of the consolidated actions," which would not have occurred without its participation. *Id.* at A34. And because of the district court's adoption of the proportionate share offset rule, petitioners are no worse off under the order barring claims against Pinnacle West than they would have been in the absence of the settlement. *Id.* at B15.

Kokkonen v. *Guardian Life Ins. Co. of America*, 114 S.Ct. 1673 (1994), provides no support for petitioners' claim that the district court lacked authority to include Pinnacle West within the scope of the settlement bar. In *Kokkonen*, this Court held that, when a suit had been dismissed with prejudice and the order of dismissal did not incorporate (or reserve the court's jurisdiction to enforce) the parties' settlement agreement, the district court could not entertain a later suit for breach of the settlement absent an independent basis for subject matter jurisdiction. *Id.* at 1677. This case does not involve a suit to enforce a settlement agreement, but rather a court's authority to approve a settlement and a related settlement bar in a case over which it indisputably had subject matter jurisdiction.

Nor does the court of appeals' decision in this case conflict with *FDIC* v. *Geldermann, Inc.*, 975 F.2d 695 (10th Cir. 1992). *Geldermann* involved an attempt by the FDIC to obtain an order barring the defendants in that action from seeking indemnity or contribution from various nonparties with whom the FDIC had

entered into a settlement in wholly unrelated litigation. 975 F.2d at 696. The nonparty beneficiaries for whom the FDIC sought the settlement bar in *Geldermann* were never before the court. 975 F.2d at 698-699. For that reason, the Tenth Circuit held that "the FDIC [was] not the real party in interest" to request a bar order, and, therefore, that Rule 17(a) of the Federal Rules of Civil Procedure prevented the court from addressing the FDIC's request. 975 F.2d. at 697.

Rule 17 does not support petitioners' argument in this case. That rule, which requires generally that an action be prosecuted in the name of the real party in interest, is not a limitation on jurisdiction. To the contrary, the Rule expressly anticipates that the absent beneficiary of the requested relief may ratify the request for relief and thereby give the request "the same effect as if the action had been commenced in the name of the real party in interest." Fed. R. Civ. P. 17(a). Moreover, here, unlike in *Geldermann*, the beneficiary of the bar order—Pinnacle West—was a party before the court in several of the consolidated cases, and it participated in its own right in the extensive negotiations and hearings that culminated in the settlement. There is doubt that, as the district court found, Pinnacle West "[wa]s seeking a bar order for itself." Pet. App. A33.

Geldermann is also distinguishable because the district court in that case applied a *pro tanto* offset rule, under which a nonsettling defendant is entitled to a credit only for the amount actually paid in settlement by the settling parties. 975 F.2d at 699; see *McDermott, Inc.* v. *Amclyde*, 114 S. Ct. 1461, 1465-1469 (1994). Application of a settlement bar in those circumstances raises fairness concerns not present

here, because under the *pro tanto* rule the non-settling parties may be saddled in the principal litigation with liability exceeding their share of fault. Pet. App. A33-A34.[6]

2. Petitioners argue (Pet. 19-24) that they have been denied due process under the Fifth Amendment and FIRREA. They contend (Pet. 19-20), first, that Pinnacle West was not a party defendant to all of the consolidated lawsuits, and "as a matter of due process the court cannot adjudicate the rights of entities whose claims are not before the court," Pet. 20. It is petitioners, however, that complain of a due process violation, and petitioners (along with their objections to the settlement) were indisputably before the court. Moreover, Pinnacle West (which was a party in the related Derivative and Class Actions) participated fully and openly in the settlement negotiations and the hearings, Pet. App. A18-A19, A34-A35, and was treated by the court for purposes of the settlement as if it has been a party defendant in the RTC suit.[7] Petitioners identify no procedural impediment occasioned by Pinnacle West's nonparty status.

Second, petitioners contend (Pet. 20-24) that by requiring them to relinquish their Compensation Claims as a condition to the dismissal of the RTC's claims against them, the RTC has penalized them and taken their property (*i.e.*, their legal claims) without

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[6] As the district court recognized (Pet. App. A40), application of a *pro tanto* offset rule may nonetheless be appropriate in certain contexts.

[7] The district court found that it had been "fully informed on all aspects of the RTC's claims against the Nonsettling RTC Defendants and the Nonsettling RTC Defendants' claims against the RTC *and possible claims over against other parties and nonparties*." Pet. App. A9 (emphasis added).

according them procedural due process. Before requiring a party to give up claims against the RTC as a quid pro quo for settlement, the RTC is bound (in petitioners' view) to afford them the same procedural protections that would have been due under FIRREA in an action seeking a suspension, injunction, or civil penalty, Pet. 21-22, as well as "all of the protections afforded by the Fifth and Sixth Amendments, including notice, confrontation, jury trial, the requirement of proof beyond a reasonable doubt and compulsory process," Pet. 23.

The proposition that a demand made by the government as a condition to the settlement of a civil action amounts to a "penalty" has no foundation. Such a demand has no effect on the opposing party's extant legal rights or obligations. It does not change the strength of that party's claims or defenses. Although the terms of the government's settlement offer may affect the desirability of a settlement, the government is not constitutionally required to offer settlement on any basis whatever, and the opposing party is under no legal compulsion to accept terms that it deems unfavorable.

In this case, moreover, petitioners were not singled out for adverse treatment, but were instead offered a settlement on the same terms as those accepted by the other individual defendants. And, after exercising their rights to reject that settlement offer, petitioners were left in no worse position than they would have occupied had the offer never been extended.

3. Petitioners argue that the court of appeals improperly looked to federal law rather than to the law of Arizona to analyze the permissibility of imposing a settlement bar on nonsettling defendants' indemnity claims. Pet. 25-27 (citing *O'Melveny &*

Myers v. *FDIC*, 114 S. Ct. 2048 (1994)). It is unclear whether the court of appeals applied federal or state law, but in the context of this case the question is wholly academic. Petitioners cite no Arizona authority for the proposition that a settlement bar cannot be applied to claims for noncontractual indemnity.[8] Moreover, because (in the context of the RTC's tort suit) petitioners could have no claim for equitable indemnity under Arizona law, see note 5, *supra*, the existence *vel non* of an order barring such a claim can have no impact on their substantive rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] The application of a settlement bar to claims based on equitable indemnity is, as the courts below noted (Pet. App. A35-A36, B18-B19), consistent with the majority rule under federal law. See *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 495 (11th Cir. 1992); *In re Masters Mates & Pilots*, 957 F.2d 1020, 1028 (2d Cir. 1992); *Associated Elec. Coop.* v. *Mid-America Transportation Co.*, 931 F.2d 1266, 1272 (8th Cir. 1991).